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 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
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18 COYNES L. ENNIX JR., M.D.,

19 Plaintiff,

20 vs.

21 ALTA BATES SUMMIT MEDICAL
 22 CENTER,

23 Defendants.

24 Case No. C 07-2486 WHA

25 **PLAINTIFF'S MOTION IN LIMINE
 26 NO. 8 TO EXCLUDE CERTAIN
 27 TESTIMONY OF WARREN KIRK;
 28 DECLARATION OF RACHEL
 SATER**

29
 30 **Trial Date: June 2, 2008**
 31 **Dept: Ctrm. 9, 19th Floor**
 32 **Judge: Hon. William H. Alsup**

33 Plaintiff Coyness L. Ennix, Jr. ("Dr. Ennix") moves to exclude certain testimony of
 34 Warren Kirk, chief Executive Officer of ABSMC. ABSMC designated Mr. Kirk to testify
 35 regarding various subjects, including "Plaintiff's efforts to exert outside pressures to influence
 36 the peer review process." But such testimony would have no probative value regarding
 37 ABSMC's motivation or the veracity of its proffered justification of protecting "patient safety."
 38 If such testimony has any probative value, it is outweighed by the potential prejudice, confusion,
 39 and waste of time.

1 Therefore, the Court should exclude Mr. Kirk's testimony on this issue as irrelevant.

2 **STATEMENT OF FACTS**

3 Dr. Ennix claims that ABSMC discriminated against him based on his race in violation of
 4 42 U.S.C. § 1981 in a peer review process conducted at the Summit campus. When Dr. Ennix
 5 realized that he was being unfairly targeted for unusually harsh peer review as compared to his
 6 white peers, he asked for assistance from various members of the medical community and civil
 7 rights organizations, many of which submitted letters of support. In its initial disclosures,
 8 ABSMC stated that it would call Mr. Kirk to testify regarding "Plaintiff's efforts to exert outside
 9 pressures to influence the peer review process," among other issues. (Sater Decl., ¶ 2, Exhibit A,
 10 at 8:15.)

11 **ARGUMENT**

12 The sole issue in this case is whether race was a factor in ABSMC's peer review actions
 13 against Dr. Ennix that nearly ruined his career as a cardiac surgeon. This Court should exclude
 14 testimony by Mr. Kirk regarding "Plaintiff's efforts to exert outside pressures to influence the
 15 peer review process," because any such testimony is not probative as to whether ABSMC had
 16 acted with improper motive in its peer review of Dr. Ennix. Evidence is admissible if it is
 17 probative as to a "fact of consequence" and its probative value is not "outweighed by the danger
 18 of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue
 19 delay, waste of time, or needless presentation of cumulative evidence." FRE Rules 401, 403.
 20 Dr. Ennix's efforts to protect his career in the face of a peer review process he perceived to be
 21 unfair and racially motivated have no probative value regarding whether ABSMC's actions
 22 regarding the current peer review were justified by patient care concerns or were motivated by
 23 racial animus. On that basis, Mr. Kirk's testimony on this subject should be excluded.

24 Finally, even if Mr. Kirk's testimony regarding Dr. Ennix's efforts to garner support for
 25 himself during the peer review process had any probative value in this case, such minimal value
 26 would be outweighed by its potential for unfair prejudice and confusion of the jury, which might
 27 erroneously conclude that such efforts amounted to Dr. Ennix's concession of the criticism

1 against him. **[Scott, what are we trying to say here?]** Further, presentation of this extraneous
2 evidence would unnecessarily waste time and delay conclusion of this case. For these additional
3 reasons, this Court should exclude such evidence.

4 CONCLUSION

5 For the foregoing reasons, Dr. Ennix respectfully requests that the Court exclude the
6 testimony of Mr. Kirk regarding this issue.

7 Respectfully submitted,

8 Dated: April 29, 2008

MOSCONE, EMBLIDGE & QUADRA, LLP

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10 By: _____ /s/
11 Rachel J. Sater

12 Attorneys for Plaintiff

13 DECLARATION OF RACHEL J. SATER

14 I, Rachel J. Sater, declare:

15 1. I am an attorney licensed to practice law in the State of California and in this
16 Court. I am an attorney at Moscone, Emblidge & Quadra, LLP, counsel of record for the
17 Plaintiff.

18 2. Attached hereto as Exhibit A is a true and correct copy of relevant portions of
19 ABSMC's initial disclosures in this case.

20 I declare under penalty of perjury under the laws of the State of California that the
21 foregoing is true and correct to the best of my knowledge.

22
23
24 Dated: April 29, 2008

_____ /s/
25 Rachel J. Sater

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19 ALTA BATES SUMMIT MEDICAL CENTER

20 UNITED STATES DISTRICT COURT

21 NORTHERN DISTRICT OF CALIFORNIA

22 COYNES L. ENNIX, JR., M.D.,

23 Plaintiff,

24 v.

25 ALTA BATES SUMMIT MEDICAL CENTER,

26 Defendant.

27 CASE NO. C 07-2486 WHA

28 **DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION IN LIMINE
NO. 8 TO EXCLUDE CERTAIN
TESTIMONY OF WARREN KIRK**

DATE: May 19, 2008

TIME: 2:00 p.m.

DEPT: Ctrm. 9, 19th Floor

JUDGE: Hon. William H. Alsup

COMPLAINT FILED: May 9, 2007

TRIAL DATE: June 2, 2008

1 **I. INTRODUCTION**

2 Defendant Alta Bates Summit Medical Center ("ABSMC" or "the Hospital"),
 3 hereby submits this opposition to Plaintiff Coyness L. Ennix's ("Plaintiff's") Motion in
 4 Limine No. 8 to Exclude Certain Testimony of Warren Kirk.

5 ABSMC has identified Mr. Kirk, ABSMC's Chief Executive Officer, in its
 6 Witness List. ABSMC maintains that Mr. Kirk may offer testimony concerning "the efforts
 7 of Dr. Ennix to use outside pressure to influence the peer review process." It is this
 8 anticipated testimony that Plaintiff seeks to exclude by way of the Motion in Limine No. 8.

9 **II. ARGUMENT**

10 The Federal Rules of Evidence provide that relevant evidence is admissible
 11 at trial. Rule 401 states that "[r]elevant evidence" means evidence having any tendency
 12 to make the existence of any fact that is of consequence to the determination of the
 13 action more probable or less probable than it would be without the evidence. See also
 14 *U.S. v. Boulware*, 384 F. 3d 794, 805 (9th Cir. 2004).

15 At the heart of this litigation is the preservation of ABSMC's right to conduct
 16 the peer review process¹ and Plaintiff's erroneous allegation that ABSMC was motivated
 17 by racial discrimination. The anticipated testimony to be offered by Mr. Kirk involves
 18 Plaintiff's efforts to use outside pressure to influence the peer review process. Such
 19 testimony is based on Mr. Kirk's personal knowledge of the contacts made by several
 20 African American community organizations concerning the circumstances surrounding
 21 Plaintiff's suspension and/or restriction of privileges at ABSMC. The claims made by

22 ¹ "Hospital peer review, in the words of the [California] Legislature, is essential to
 23 preserving the highest standards of medical practice throughout California." *Kibler v.*
Northern Inyo County Local Hosp. Dist., 39 Cal. 4th 192, 199 (2006) (internal quotations
 24 omitted). Indeed, both the Supreme Court of the United States and the Ninth Circuit
 25 Court of Appeals have acknowledged a medical staff's "unquestioned right to exercise
 26 some control over the identity and the number of doctors to whom it accords staff
 27 privileges." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 (1984); *County of*
Tuolumne v. Sonora Community Hosp., 236 F.3d 1148, 1155 (9th Cir. 2001). Because
 28 of this, "the decision of a hospital's governing body concerning the granting of hospital
 privileges is to be accorded great deference." *Id.* (citing *Laje v. R.E. Thomason Gen.*
Hosp., 564 F.2d 1159, 1162 (5th Cir. 1977)). And because of this deference, the
 assessment of a particular physician's capabilities "is not one which [courts] are inclined
 to impugn." *Baqir v. Principi*, 434 F.3d 733, 742 (4th Cir. 2006).

1 these organizations are founded on Plaintiff's one-sided representation of his peer
 2 review process and ABSMC's alleged racial discrimination. Mr. Kirk's anticipated
 3 testimony will assist a jury in an understanding of ABSMC's state of mind surrounding
 4 the competing interests of high profile, African American community organizations
 5 community and ABSMC's responsibility to patient care. Such evidence also supports
 6 ABSMC's defense that Plaintiff's intent was to effectively stop or hinder, by any means
 7 possible, the peer review process, which is "essential to preserving the highest
 8 standards of medical practice." ABSMC should not be hindered in presenting evidence
 9 that supports its position that its decisions concerning the peer review process were not
 10 motivated by racial discrimination.

11 Finally, Plaintiff asserts that this testimony of Mr. Kirk should be excluded
 12 because its probative value is substantially outweighed by the potential prejudicial
 13 impact on the jury. Fed. R. Evid. 403. Plaintiff's sole argument in support is the
 14 contention that the probative value of the testimony of Mr. Kirk is outweighed by unfair
 15 prejudice and confusion of the jury, which "might erroneously conclude that such efforts
 16 amounted to Dr. Ennix's concession of the criticism against him." This assertion is
 17 unsupported by the facts and should be rejected by this Court. Only Plaintiff is confused
 18 by this faulty reasoning: "[Scott, what are we trying to say here?]." See Plaintiff's Motion
 19 in Limine No. 8, 2:1. By no stretch of the imagination can one link Mr. Kirk's anticipated
 20 testimony with the unreasonable conclusion offered by Plaintiff. Any potential prejudice
 21 does not outweigh the relevance of Mr. Kirk's testimony which speaks directly on the
 22 claims Plaintiff alleges in his lawsuit. The only confusion lies with Plaintiff.

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1 **III. CONCLUSION**

2 For each of the foregoing reasons, ABSMC respectfully requests an order
3 denying Plaintiff's Motion in Limine No. 8, which seeks to prevent the introduction of
4 relevant testimony of Mr. Kirk at trial. The probative value of such testimony is nor
5 outweighed by the potential for prejudice, confusion and waste of time.

6 DATED: May 9, 2008

7 KAUFF MCCLAIN & MCGUIRE LLP

8 By: 
9 ALEX HERNAEZ

10 Attorneys for Defendant
11 ALTA BATES SUMMIT MEDICAL
12 CENTER

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